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Keynote Address

Newton Minow

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SYMPOSIUM*

I. KEYNOTE ADDRESS BY NEWTON MINOW¹

As Father Shanks told you, my life has combined the law with the mass media. I started as a law clerk for the Chief Justice of the United States, and through the years I have led a large law firm, I have represented journalists in court, been chairman of PBS, and served on boards of newspapers. So I've seen through the prism and the perspective of journalism, and also through the prism and perspective of the law.

My own sense is that, if Rip van Winkle, after sleeping for several hundred years, returned today and walked into a courtroom, he would not find what goes on in the courtroom terribly different from what he would have seen 200 years ago. He would be surprised at the way we pick juries, because years ago, starting in the famous case that Chief Justice Marshall decided in 1807, when the trial for treason of Aaron Burr was going on, Aaron Burr's lawyer said to the Court, "We can't get a fair jury because there is too much

* This symposium presents excerpts from transcripts of the Conference: "Courts and the Mass Media: The Ethical Issues" that took place January 24-25, 1997, at Santa Clara University. Santa Clara University School of Law and the Markkula Center for Applied Ethics cosponsored the event.

1. Mr. Minow received a B.S. in 1949 and a J.D. in 1950 from Northwestern University. He is also the recipient of ten honorary LL.D. degrees from other U.S. universities. Currently, he is with the Chicago law firm Sidley & Austin and is the Annenberg Professor of Communications Law and Policy at Northwestern University.

Among his other positions are affiliations with several law firms, law clerk to U.S. Supreme Court Justice Fred Vinson (1951-52), administrative assistant to Adlai E. Stevenson (1952-53), and chair of the Federal Communications Commission (1961 to 1963).

Minow has served on numerous corporate boards, has chaired several public service companies, and has been appointed trustee of a number of academic institutions. He is a fellow of the American Bar Association and Chicago Bar Foundation and a member of various civic and public service groups. He is the co-author of *ABANDONED IN THE WASTELAND: CHILDREN, TELEVISION AND THE FIRST AMENDMENT* (Hill & Wang division of Farrar, Straus & Giroux, 1995), and author of *EQUAL TIME: THE PRIVATE BROADCASTER AND THE PUBLIC INTEREST* (New York: Atheneum, 1964), and co-author/contributor of numerous publications dealing with broadcasting and the public interest.

publicity that's been around. We don't want anybody who knows anything about the case." And the case went to the Chief Justice of the United States, Chief Justice Marshall. He said, "Well, that's impossible, we don't want to discourage citizens from being well informed. They can be on the jury provided they say that they will be fair, and decide the case on what they hear in the courtroom." Through the years we've changed that; I'll come back to that as we go on.

Now Rip van Winkle returns, he goes out of the courtroom after 200 years, and he can't believe what he sees, because he discovers radio, he discovers television, he discovers cable, he discovers satellites, he discovers the telephone, he discovers computers, he discovers wireless communication, he discovers faxes, he even discovers the Internet. So there's been a revolution outside the courtroom. Today most of the people in the United States get most of their information from radio and television rather than in print. The radio is on, for most people, more than three hours a day. Television is on as much as seven hours in most homes a day. Sixty-four percent of the people do read newspapers, but we have a media-saturated society.

Not long ago I saw Peter Arnette of CNN (remember, he's the one who broadcast from Baghdad every night during the Gulf War) and I said, "Peter, during the Gulf War not only were the American people getting all their news from you, but so were the President of the United States and so was Saddam Hussein." He said, "I've got [a story] to top you, Newt." He said,

I was on a story in Washington. When I got home, at the CNN headquarters, we got a story that Ollie North had been badly injured, and I have a secret, secret, secret number in the secret, secret, secret bowels of the Pentagon which knows everything. I called that number. I got the officer in charge. I said, "We have a story; there's a rumor around that Ollie North has been badly hurt. Is that true?" The officer in charge says, "Absolutely not." I asked, "How do you know?" He said: "Well, I've been on duty all night, I've got CNN on and it hasn't been on CNN, so it isn't true."

That's the world we live in today.

So, if a case involves a high-profile defendant, a Mayor Marion Barry in Washington, D.C., or a Lieutenant Colonel

Ollie North, or a Manuel Noriega, or a Valdez Captain Joseph Hazelwood, or Leona Helmsley, or Theodore Kaczynski, or Mike Tyson, or O.J. Simpson—household names well-known to the citizens of this country—when we get to jury duty, what we see, thus far, is that the courts haven't changed that much, but the mass media have. The two institutions have come, in this latter part of the 20th Century, into a collision course, and one conclusion I think we can all agree on is that technology moves faster than the law.

Now I'll give you one case that's in court at this minute to illustrate the problem. How many of you know what Megan's Law is? Quite a few. If you lived in New Jersey almost all of you would have raised your hands. Megan was a seven-year-old girl who a few years ago was lured into a house across the street from where she lived, was sexually abused and then murdered. It turned out that the person suspected of the crime had been recently released from prison, and he had a long record of prior sexual abuse. The community was very upset, went to the State Legislature, and a law was passed called Megan's Law, which required the notification of neighbors in a community when a person with a record like that was released from prison and moved into the neighborhood; that's Megan's Law.

The man charged with Megan's murder is now coming to trial, right now, and the jury is being picked right now. And the defense lawyers, representing the defendant, are asking prospective jurors, "Do you know what Megan's Law is?" And if they say yes, the defense says, "We want that juror stricken and not to serve on the jury because if he knows about Megan's Law, or she knows about Megan's Law, they'll also connect this defendant with that case, they'll know that he had a criminal record, and he won't be able to have a fair jury."

This has gone up to the higher courts in New Jersey twice. It's now back, and the judge has impaneled 4,000 prospective jurors, he is engaged in questioning jurors, which he says will take him until May, and that's the current issue of Megan's Law: Whether the defendant can get a fair trial, whether prospective jurors who read the paper or listen to radio or television can serve on the jury.

It's madness to think, in today's mass media society, that we should search for jurors who know nothing. In fact, we've

turned the tables. Now when a person is called for jury duty we give them a massive questionnaire to read. In some cases the questions can go on for a hundred pages. Last year a woman in Texas was called for jury duty, her name was Diane Branborg, and she was given a series of questions to answer in Denton County, Texas. The district judge, whose name was Sam Houston, had questions such as "What is your income? What is your religion? What books do you read? What are you favorite television programs? Have you ever been divorced?" She finally got upset, and said, "I'm entitled to some privacy. These questions are nobody's business but my own." The judge said, "Okay, lady, you're going to jail for contempt," and he put her in prison. She finally got out, and I wrote a piece about this in the Wall Street Journal at the time. I suggested that the answer she should have given was to tell the story about the young couple who went to the zoo, and asked the zookeeper if he could show them where the hippopotamus was. They went into where the hippopotamus was, and the young couple looked at the hippopotamus from every angle for about a half hour, whispering to each other, and finally they went up to the zookeeper and they said, "Sir, is that a male or female hippopotamus?" The zookeeper said, "That is a question which should be of interest only to another hippopotamus." Yet, what we do now is ask jurors more about themselves than they may learn in the courtroom about the parties. I think that it's madness to look for juries who know nothing, and then tell the parties everything about the jurors.

We're going to talk about, in the next two days, cameras in the courtroom. I think we should think, in terms of cameras in the courtroom, not only about the trial court. Earlier this month the Supreme Court of the United States heard the arguments in the assisted suicide case, an issue which will affect every family in the United States at some stage of the family's life. I have a particular interest in that case; our firm filed briefs on behalf of the doctors, the nurses, and 60 medical associations. We're very interested in it. I noticed that the night before the argument there were hundreds and hundreds of people, standing outside the Supreme Court, waiting outside in the rain to see if they could get one of the 50 seats available to the public in the courtroom. Fifty seats are set aside for the public in the courtroom. Through modern technology we've got 50 million seats, in 50 million homes

in America, so that anyone who wanted to hear the arguments in this vitally important case could see and hear the arguments. Yet we do not allow that. If we believe that proceedings are public—and obviously an argument in the Supreme Court is public—how can we say that modern technology should not be allowed to convey that information to everyone in the country who wants to hear it? The mass media are here to stay; they're not going to disappear. What has happened—and this was mentioned by Father Locatelli in his opening remarks—is that, in the collision between the courts and the mass media, the debate has focused only on rights. The press says, "We have rights under the First Amendment." The courts say, "Under the Sixth Amendment we've got to guarantee a fair trial; the defendant has rights."

I have been thinking about this issue for years, and I want to tell you a story. When I served on the Board of CBS, I was very upset about the practice of the television networks of projecting election results before the polls closed, and I asked that we have a discussion of that issue one day at the CBS Board meeting. The CBS News president and his team came in, with all their computer printouts, their exit polls, their databases, their prior election results, and they showed us the methodology by which they make election projections. And I asked the president of CBS News, I said, "Why do we do this?" He looked at me and he said, "Well, we have a right to do this under the First Amendment." I said, "My question is why do we do this?", and he said, "Well we have a right to do this under the First Amendment." I said, "Maybe I'm not making myself clear." I said, "Why do we do this? Are we afraid that NBC or ABC will call the election results before we do?" He said, "No, we have a right to do this under the First Amendment." I said, "Acknowledging that we have a right to do this under the First Amendment, tell me why we do it." He said, "Well, we know who won the election, we have all this technology and databases. We cannot sit on that information, we must share it immediately with the American people." I said, "Well, if that's the case, why don't you say, 'We will give you our projection now' instead of 'We'll give you our projection after the next commercial?'" I never got an answer to that question, but I know what it would have been. It would have been, "Because we have a right to do it that way under the First Amendment."

What has happened is that we think, in our current level of debate, that if you say you have a right to do something, that that is the end of the discussion, particularly if you say you have a right to do this under the First Amendment. Who wants to be against the First Amendment? No one does. Freedom of speech is the most important value in this country. But we've got to get beyond talking about whether you have the right to do it, and in the words of Justice Potter Stewart of the Supreme Court, ask whether it is the right thing to do. And that goes for all of us—whether we are a defense lawyer, a prosecution lawyer, a judge—as we deal with these issues.

The mass media will not disappear. People will continue to spend six or seven hours a day watching television, or three hours a day listening to the radio, and we will not be very sensible if we seek to find jurors who don't know anything. We have to stop being Don Quixote—whether we're in New Jersey or somewhere else—looking for jurors who are ignorant. Just as Chief Justice Marshall decided in 1807, we have to recognize the difference between an impartial juror and an impartial jury. The whole concept of having twelve people on a jury is to bring people of diverse backgrounds and perspectives into one room to decide a case. It is not to find twelve people who are all the same.

We got the jury system from England. The origins of the jury system began in the 11th Century, and in fact Jo and I were in Europe last year and actually saw the original Magna Carta where the jury system began. The concept of the jury system was that you were entitled to a jury of your peers. At that time a peer meant—believe it or not—someone who knew you, someone who lived in the neighborhood, someone who knew all the parties, and someone who knew who was a liar and who would tell the truth. If you were a stranger, you could not serve on a jury; a stranger was ineligible. Somehow, over the centuries we've turned that upside down.

More than 120 years ago, Mark Twain, in 1871, went to a trial in Virginia. This was at the time when the telegraph and the newspapers were expanding in this country, and Mark Twain witnessed the selection of a jury in this case, and I'm going to read you what he said. He said,

I remember one of those sorrowful farces in Virginia which we call a jury trial. A noted desperado killed Mr.

B., a good citizen, in the most wanton and cold-blooded way. Of course, the papers were full of it. All men capable of reading read about it, and of course all men not deaf and dumb and idiotic, talked about it. A minister, intelligent, esteemed, and greatly respected; a merchant of high character and known probity, a mining superintendent of intelligence and unblemished reputation, a quartz mill owner of excellent standing; were all questioned in the same way, and all were set aside from the jury. Each said public talk and the newspaper reports had not biased his mind, but that sworn testimony would overthrow any previously formed opinion and enable him to render a verdict without prejudice and in accordance with the facts.

But, as Mark Twain says, "Such men could not be trusted with the case. Ignoramuses alone could mete out unsullied justice." So remarked Twain 120 years ago. What would he say about the practice of looking for jurors who never heard of Megan's Law in New Jersey? What would he say about moving the [Oklahoma City bombing] case from Kansas City to Denver, as if that is going to change what people know about the case? We live in a world where the mass media is omnipresent, where it's everywhere, and I believe that 126 years after Mark Twain we ought to say, "Mr. Twain, you were right then," and as we seek to reconcile the courts and the mass media, we ought to start by ending the practice where defendants and prosecutors know more about the jurors than the jury will ever know about the prosecutors and defendants.

II. PANEL DISCUSSION: TELEVISIONING HIGH-PROFILE CASES

PANELISTS: Johnnie L. Cochran Jr.,² Richard D. Huffman,³ Rikki I. Klieman,⁴ Kelli L. Sager.⁵

2. Mr. Cochran received a B.S. in business administration from UCLA in 1959 and a J.D. from Loyola University School of Law in 1962. After admittance to the California State Bar in 1963, he did graduate work in law at the University of Southern California.

Cochran was a deputy city attorney for the city of Los Angeles from 1963 to 1965, a founding member of the law firm Cochran, Atkins & Evans in 1966, and an assistant district attorney of Los Angeles County from 1978 to 1980. In 1981, he returned to the private practice of law, specializing in personal injury litigation, entertainment law, public financing, and criminal defense under the firm name Johnnie L. Cochran, Jr. Inc.

Cochran has won numerous awards, has spoken widely on various aspects of the criminal justice system, has appeared as a guest attorney on several television programs, and has served on many commissions and boards. Before serving as lead attorney for the O.J. Simpson defense team in 1995, he had won record settlements for his clients in cases against city and state governments. In 1996, Ballantine Books published his autobiography, *JOURNEY TO JUSTICE*.

3. Judge Huffman earned an A.B. from California State College, Long Beach, in 1961 and a J.D. from the University of Southern California in 1965.

He was appointed an associate justice for the California State Court of Appeal, 4th District, San Diego, by Governor Deukmejian in October 1988 and continues in that position. He worked in the California Attorney General's Office from 1966 to 1971; as an assistant district attorney and chief deputy district attorney, San Diego District Attorney's Office, from 1971 to 1985; and as judge, San Diego Superior Court, in 1985. He has prosecuted a number of high-profile cases, including *People v. Robert Alton Harris*, *United States v. James Frattiano*, and *People v. Yakopec*.

Huffman is former vice-president of the San Diego County Bar Association and has served as an honorary diplomate of the American Board of Trial Advocates, a fellow of the American College of Trial Lawyers, and two terms as a member of the State Bar of California Commission on Judicial Nominees Evaluation.

4. Ms. Klieman earned a B.A. in theater at Northwestern University in 1970 and a J.D. from Boston University School of Law in 1975. After law school, she served as a law clerk for the Honorable Walter Jay Skinner of the U.S. District Court of Massachusetts and prosecutor with the District Attorney offices in Middlesex and Norfolk counties. Before starting her own practice, she was a partner at Friedman & Atherton, Boston. Currently, she is of-counsel to the Boston firm of Klieman, Lyons, Schindler, Gross & Pabian and an anchor for the Courtroom Television Network in New York. She also has been featured on a number of other television programs including "Today," "Good Morning, America," and "The McLaughlin Group."

Klieman has been the subject of numerous magazine and newspaper articles, featured on television shows, and named one of the five most outstanding women trial lawyers by *Time* magazine in 1983. She is teaching as an adjunct faculty member at Columbia Law School. Additionally, she lectures throughout the country on the legal system and teaches trial advocacy at several academic institutions. Besides serving on the Advisory Committee of the U.S. Supreme Court, her many affiliations include membership in the American, Massachu-

A. *Introduction*

Professor Peter L. Arenella opened the discussion on "Televising High-Profile Cases" by asking the other panel members to respond to the question: "Should highly publicized cases be televised?" Arenella went on to comment that the right to public access to courts does not mean that everyone has a right to observe all trials. Arenella continued by stating that maximizing access to high-profile cases is akin to utilizing trials as a form of entertainment, which creates problems in attempting to achieve justice.

B. *Panel Discussion Excerpts*

1. *Johnnie Cochran*

...

Let's look at some lessons that we might have learned from the [O.J. Simpson] case, and some positive things that came out of the case that you may not have thought about.

Number one. This is a truism. By virtue of what happened in the Simpson case, the public, around this country and the world, knows about the improper handling of the evidence; and with the concurrent coverage that occurred, they found out this [case represents] a national problem in police departments all across America . . . Citizens deserve better. Now, L.A., thank heaven, is trying to do something about it, with regard to how evidence is handled. We deserve better; but it was exposed by virtue of the Simpson case. Make no mistake about it. There have been changes and reforms around this country, [and they] happened because of the Simpson case.

setts, and Boston Bar associations and the Massachusetts Association of Women Lawyers.

5. Ms. Sager studied at the University of Southern California and earned a B.A. in political science and journalism at West Georgia College in 1981 and a J.D. in 1985 from the University of Utah College of Law, where she was Editor-in-Chief of the University of Utah *Law Review*.

Sager is a partner in the Los Angeles office of Davis Wright Tremaine. She specializes in media, intellectual property, and entertainment law. Her practice has included work at the trial and appellate levels for television networks, movie and television producers, and newspapers and national magazines. Most recently, Ms. Sager represented a coalition of media organizations in *People v. Simpson*. She is a member of the governing board of the ABA Forum on Communications Law and of the Los Angeles County Bar Intellectual Property Committee. She has authored and co-authored a number of publications on developments in media, intellectual property, and entertainment law.

...

In addition, having [the case] televised helped us locate a number of important witnesses. There is no mistake about it. The day I entered that case, Kathleen Bell sent a fax to me and the prosecutors saying: "You can't trust this guy. This guy is a lying racist" We got witnesses like that.

...

There is another aspect that people have had a tough time understanding—but I want you to follow me on this one. The television and the televising of the Simpson case helped us expose this so-called racial divide. One publication has called it, "the race-rooted gaps in the perception of the criminal justice system." In this country we are all Americans; but we live different lives. We don't always live together; we don't spend time together; we don't go to church together; we have different perceptions. In one community we see the police as oppressors. In another community we see the police as protectors.

It took the Simpson case to help us understand how we see the justice system differently. [Consider] the experiences of people who have been through the justice system: One group has seen injustice after injustice after injustice. The cheering [at the verdict], if you took the time to understand, was not about one man, and not about any insensitivity about these victims. It was about the fact that they felt that this one time, somebody who looked like them was able to get some measure of justice. That's why they were cheering. These race-rooted gaps existed; they weren't created by this case.

...

Peter talked about "access in education." I think that one of the things I have been most happy about after the trial concerns the public's right to know, and the question of access. Jerry [Uelmen's] dealing with the Fourth Amendment was one of the high points in the trial for the lawyers. And I'll tell you—if you talk about education—people around this country now understand a lot more about the Fourth Amendment by virtue of Jerry. He wasn't showboating; he did his job; it was magnificent.

...

They tell the joke "that everybody in America understood that the evidence should have been suppressed except two

people: Judge Kathleen Kennedy Powell and Judge Lance Ito." The rest of us understood that the affidavit was perjurious. We established that. There was no probable cause to go over that fence; they lied about it, and it was clear. Now that's educational.

So you see things you don't want to always see, because it goes back to your life experiences Sure, we're going to have problems about high-profile trials in the future, but I think that the judges should use their discretion

. . .

By and large I think there was a role for cameras in this case. Judge Lance Ito wanted this verdict to have some credibility, by virtue of people seeing it for themselves. And perhaps the best example of that—if you'll think about it—is the glove demonstration. There was a reporter who was biased from the beginning and believed that Simpson was guilty; when Christopher Darden asked him [O.J.] to try those gloves on, the reporter said that he was faking—that he was acting. If you've seen his [O.J.'s] movies you knew he wasn't acting; he couldn't act that well, anyway—those gloves didn't fit. As Jerry Uelmen said so well—and I get credit for this, but it's really Jerry's line—"If the gloves didn't fit, you must acquit." But the important point is that people who sat at home saw for themselves—that those gloves were too tight. I didn't want to rely upon some reporter who was biased to tell [the public] whether they fit or not. That was the best example, if you think about it. That's what really happened. And I must say, whatever the verdict is in the civil trial, it will have less credibility among certain segments of the community by virtue of the fact that it was not televised.

You think about what happens when judges don't have that presumption. You have a judge like Fujisaki, for whatever reason, denying cameras. Now the restrictions he imposed are worse than in *Polly Klaas* or in *Susan Smith*: No audio, no this, no that. Why would he do that? Having cameras in the courtroom makes everybody a little bit more honest and fair. You read those transcripts sometimes of how a judge treats the participants when the camera's not there. Some of these [judges] are tyrants. That's one reason why some people say—I'm not saying this—but that is why some people say that federal judges don't want cameras in the courtroom. Those people are tyrants. They don't answer to

anybody but themselves. The public should see how these trials are conducted. What do they have to hide?

...

2. *Kelli Sager*

...

I agree with Peter [Arenella] that there certainly is no case law now that says there's a First Amendment right to have electronic access to courtrooms. The U.S. Supreme Court has not yet held that. And, while I firmly believe that [electronic access to courtrooms] is required under the First Amendment, there's no expectation that that is going to happen in the near future—which I think is a tragedy. I also agree with Peter—that there is no reason whatsoever that ordinary trials should not be televised. But the unfortunate fact is . . . we don't have a Supreme Court decision that makes judges allow cameras in their courtrooms and many judges don't allow cameras in their courtrooms. I think that is also a tragedy. And we are not talking about high-profile cases here, we are talking about ordinary everyday cases . . .

That's all that I can say that I agree with Peter about. What I disagree with Peter about, and I guess I would start with sort of what I view as a kind of intellectual elitism about who gets to decide what the public gets to see and hear about criminal courts and civil courts. The idea that anyone, including Peter or the government or someone else, can say "You don't need to see this. It's not educational enough. It's not important enough that you get to see these trials." I don't think that's something that anybody else should get to decide for the American public. If you want to see trials in our criminal and civil justice system, then I think you should be able to see them; and if you don't, you exercise your rights the way you do with any other program, you turn it off. You don't watch the 10:00 o'clock news if you don't want to see it. You don't watch Geraldo if you don't like him. You don't watch whatever you don't want to watch. But if you want to see what's going on in your courts, and you don't have the money to travel cross country to see what's going on in Denver in the Oklahoma City bombing case, assuming you could get in, and you don't have the ability to get into the Simpson criminal or civil courtroom; then there's no other alternative but to have it on television . . .

I disagree with Peter that maximizing public access to trials is somehow not important. That is a tenet of American jurisprudence. Historically, people in colonial America were not only expected to attend trials, but free men were required to attend. So the idea that it's not important to have maximum public access is just historically wrong. Trying to exclude high-profile cases from any kind of televised coverage—which is all that Peter says he is talking about—it just makes no sense. We should have less information available about cases where the public's interest, for whatever reason, is the greatest? That includes . . . cases like the Oklahoma City bombing case (which no one except a select few family members are going to be able to see), the Unabomber case (same thing; no cameras in federal courts), and Whitewater. These are all important cases. If the public is interested in how a celebrity defendant is treated in our courts—is he treated differently, is he treated the same as anyone else?—then they should be able to see that too.

But it seems that Peter's real complaint—at least the gist I get from his presentation—is that the news coverage wasn't good enough, that he doesn't like what the Simpson news coverage was all about, and that some media didn't do a good enough job—the networks didn't cover it as well as they should have. What I don't understand is how that justifies restricting electronic coverage of trials. Is it somehow going to be better coverage if we don't have cameras in the courtroom? Are the commentators somehow going to be more informed, more enlightened? Are the people who are watching the 10:00 o'clock news going to get more information from a news clip that has video from some other proceeding, or just video of the Bronco going down the freeway, than they would be from a news clip that actually has somebody doing something that they did in court that day? I don't see how. And it also completely ignores Court TV, CNN, local L.A. stations who covered the proceedings gavel-to-gavel. We're not talking about news clips for those proceedings. If you wanted to watch every minute of the trial, you could watch it; and there were lots of people who were that interested. And even if it's not as educational as attending one of Professor Arenella's criminal procedure classes or evidence classes, most of the world is not going to do that, and if they are learning any-

thing about the criminal justice system it's more than they would be learning without watching it

But in trying to generalize—saying all high-profile trials are the same and we should not allow coverage of any of them—it simply doesn't hold true. Television doesn't make people disagree with jurors. Now television may not be as good as being there—I will grant Peter that—but it sure is a heck of a lot better than what you might be left with without television coverage In fact, in the William Kennedy Smith trial, which was televised in Florida—as most trials are in Florida—at the end of the day a lot of people came away believing that the public accepted the verdict in that case because people got to see the evidence that was put on. That's why they came away with the feeling that maybe that was the right result, as opposed to thinking a rich guy from a rich family bought his way out

Frankly, with all due respect again to Peter, there have been studies done in every state of the United States, and in the federal courts, and every single one of them has disagreed with him in terms of [the camera's] effect on witnesses, its effect on jurors, and its effect on participants; and these include surveys from judges, who see these people before them in case after case after case, and they have overwhelmingly said it doesn't change the way the trials are conducted. It doesn't change anybody's behavior.

But last, the conclusion that Peter draws—if you are going to allow television cameras in, that you have to sequester the jury—also simply is not true. The camera had no part whatsoever in Judge Ito's decision to sequester the jury in the Simpson case. He made that very clear. He sequestered the jury because of a National Enquirer photo of Nicole Brown Simpson. That was the reason he gave. Not because the trial was going to be televised. And I agree with what Mr. Minow said in his opening remarks: You either believe that the jurors are going to follow a judge's instructions, or you don't. If you believe that the jurors are going to follow a judge's instructions, it doesn't matter whether the trial is on television or not. They're not going to be watching television or reading the newspaper. But if you believe that they are going to disobey the instructions that they are given, if you don't sequester them, then they are going to get the information from some other source. They'll get it from the newspapers, they'll

get it from commentators on television who are talking about the trial without the benefit of video; and it seems to me that the least harmful information that they could get—if they are going to cheat—is to see replayed what they already saw that day in court; to see the witness that they already saw testify. So that doesn't seem to me to be a justification for taking cameras out of the courtroom.

As I said, it's really a question of who gets to decide. Who gets to decide what you see and what you hear about criminal courts and civil courts. And . . . we're not just talking about high-profile trials, we're talking about all trials. We're talking about appellate arguments, the U.S. Supreme Court. Nobody is required today to have cameras in their courtrooms, which I think is really appalling, because when you look at it, it's our government; and if the public wants to see that and have that information, then why shouldn't they have it?

. . .

3. *Richard Huffman*

. . .

I must be here because the California judiciary has had to address this issue in the wake of the Simpson case The question asked by the author was: what advice do we give to the trial judges, and should we bar cameras from all, or should there be a presumption against cameras in "high-profile" cases.

. . .

From the standpoint of looking at the issues of coverage of our courts and the role of the judiciary, and what advice we give to judges in the exercise of their discretion, I have made a studied effort on behalf of the Judicial Council to ignore the Simpson case, and I am going to continue to do that, because it is irrelevant to what is before us today and facing the issue of coverage.

A high-profile case does not require the National Enquirer, the New York Times, and all of the networks. If you are in Chico, California and it is a high-profile case, covered every day in all of the newspapers, run on all of the local television, it is important in that community, and it is a high-profile case. That's why it is being televised in all or in part. So that for us those of us that have to make these decisions every day, "high-profile" is a meaningless term.

If you are looking at what advice I would give to a judge who is facing a mega-monster like we have been discussing—as far as the media frenzy that surrounds it—the first advice I would say to the judge is, “This is a homicide case that you’re trying. [Just] because it is high-profile, it doesn’t have to last the rest of your natural life. Everything does not have to be done at length and repetitively. It can be done in an orderly fashion, and you can move this case. You will, however, have a problem in jury selection, and it will require innovation, and it will require some thought, and it may take more time.”

But the question is: what guidance should we give them as to whether to allow the cameras or not? The Judicial Council undertook to examine that question, and we were urged to throw the bums out. Not just out of high-profile cases—out of everything; certainly all criminal cases, at least, and maybe even civil cases as well. And the Council—in trying to work through that [question] of how to deal with it—suggests that judges have to address really two issues. The first is the responsibility of the court to make, as best as it is able, a rational and fair decision in that particular lawsuit: to see that this case is resolved in a decent and honest fashion to the best of our ability.

On the other hand, the courts belong to the public, and one of the values the Judicial Council of California has is that we have to do more to increase the access of the public to our court system, through a variety of methods. The amount of ignorance in the state of California as to the existence of the courts, let alone the operation and the theory upon which they are based, is monumental; and we apparently can’t depend on the schools to deal with it, and the court system has some responsibility to participate.

We made a judgment that we would start off with no presumption for or against; that we would vest this decision in the hands of the trial judges, and we have tried as best we are able to set forth some things for them to consider We have tried very hard to allow the trial judges discretion so that we will not have lengthy side battles in the appellate courts and everywhere else as the media litigates its rights, its role, its access, what it wants. Because, with all due respect, it is subordinate to the issue of whether or not this individual has committed a crime or not, and whether that indi-

vidual receives a fair and appropriate trial. So we deliberately removed the presumption one way or the other. We provided that judges are not required to hold hearings, but may do so; do not have to make findings of fact, but may do so; and we have done that to try to limit—to the best of our ability—subordinate battles over the shape of the television table.

I would say first to the trial judges that you should look to the guidelines that we have set forth which include, among other things, as our first values, the right of the public to knowledge of its courtrooms, and the right of access so as to develop trust in the court system; and beyond that we look then to the interest of the parties. It is true that in some instances witnesses come forward, and it is true in some instances witnesses are intimidated, or damaged, or their ability to make an untainted identification is impaired by a television station showing somebody's picture on television. The privacy interests of victims can be at stake, and while most responsible media are very, very good at dealing with some of those issues, some are irresponsible; and the harm done to an individual in a given case is irremediable.

...

The courts have to find innovative ways to deal with getting at bias and protecting jurors. Sequestration is not required in most cases, and the cameras are not necessarily the reason for sequestration. It usually stems from a satellite of other concerns.

When we talk about cameras in the courtroom, we are talking then about a camera being in the courtroom as a device to assist that particular form of media in doing that which our colleague here from the L.A. Times does with his pen and pencil or his tape recorder—to gather information. The only difference is that an editor at the news station will pick the right frames and use it; and that is their right to do. But to tell us that the camera's unblinking eye gives us truth and you can't trust the reporter is, of course, nonsense in 99.999 percent of the cases covered, because no commercial station is going to invest the time or money to cover gavel-to-gavel any trial unless it is so sensational that it will develop such an audience that they can do it. Court TV does not cover anything but a minuscule number of cases. So when we talk about coverage, in most of America, for most cases, we are not

talking gavel-to-gavel coverage. We are talking camera access as one of the adjuncts to the public's right to know, so to speak. And the public's right to know is governed, in part, by what the entities publishing the material choose to publish; and that is their right, as well, but it is not that all of a sudden we have opened up America's access to all of the courts.

So I would say to the judges, that in exercising their discretion, they should start with the proposition that there is nothing wrong with having cameras in the courts; that the courts are public; that the public, if we can enhance their access even through the sound bites—that's fine; but we have to turn to our basic responsibility to look after the interests of the litigants before us, and our basic task of deciding these cases fairly and rationally, in a dignified fashion

I would only say to you that from the judiciary's point of view, speaking, I guess, to some extent on behalf of the Council, we are trying to create a rule and an implementation method in which we deliberately do not urge judges to allow or disallow cameras. We urge them to look at that as one [aspect] of America's access to the courts, as one of the media's access; that it is not the solution, and the courts are not here necessarily to educate, and we sure-as-hell aren't here to entertain.

Now, with all of that then, to my colleagues in the courts I would simply say to them, "Don't let that term 'high-profile case' have much significance." All that means is that there is a lot of news coverage, and it means you've got publicity issues, and you've got issues, whether you have cameras or not, to address with regard to your jurors, and your witnesses, and to the manner in which your case is handled. The decision to allow television or not needs to be tailored to the individual case, and one's assessment of whether you can control the proceedings Simply treat it as one of the factors in making a decision on how you are going to run the case.

. . . .

4. *Rikki Klieman*

. . . .

First, in responding to a couple of points that Peter made: I am very, very concerned about the issue that we need to keep cameras out of the courtroom in a high-profile case because we want to preserve the sanctity of the jurors' ver-

dict. What concerns me is that I get this vision of the Wizard of Oz; that if we can only see the screen, and we can never see what goes on behind the screen, that maybe we'll think it's better than it is. And I think that notion is dangerous, because we really do need to be able to see exactly what it is, for better and for worse.

. . .

All of the things, Peter, that you said are good reasons to keep cameras out of the high-profile case, I would suggest are exactly the same reasons that most critics use to keep the camera out of the courtroom altogether; that they are the same exact criteria. And the difficulty is that if we keep the camera out of the high-profile case, the danger is that it may be kept out of perhaps those cases that have significance to the local community, and yet are not those that are of national significance like the O.J. Simpson or the William Kennedy Smith.

The danger I see . . . is that somehow we are blaming the messenger for the message. The camera is merely a messenger; that's all it is. It's propped up there, and it reflects whatever it focuses upon. Peter feels that it doesn't give a true picture, but in most senses it does. It cannot record everything happening in the courtroom at the same time, but neither can a reporter be watching everything that is happening at the same time.

. . .

What we are dealing with in the wake of the O.J. Simpson case, unfortunately, is that it, by being aberrational, caused all kinds of reforms to suddenly be advocated by various groups. Johnnie Cochran voices the reforms that I would say are good reforms: Let's look at what's happening in police departments and laboratories across the country. However, what I would say is that there are also bad reforms being pushed by very strange bedfellows indeed. We have the likes of Governor Pete Wilson, prosecutors, and criminal defense lawyers calling for three things: No. 1, let's eliminate all cameras from trials; No. 2 . . . let's eliminate unanimous verdicts. Also, we should curtail what a defense lawyer can say in a closing argument because, after all, it might persuade the jury.

The idea that criminal defense lawyers have joined with these other groups, and with Governor Wilson and others who feel that way, is really fairly frightening to me . . .

In Massachusetts, where I practiced, [the cameras were] brought there into [the courtroom in] the late 1970's. It's everywhere. It's always there. It's in the back of the room. It is part of the furniture. I go into court; I don't know if it's on; I don't know if it's off. Of course, there are times when I know my trial is being televised. [But] it truly has no effect on me. I am told by my colleagues it has no effect on them. Do I know if it has effects on witnesses or jurors? No. . . . The studies say: no effect.

But I'll tell you who it does affect. The judge. I say, for the best; because a judge who will be arbitrary and capricious; a judge who will be a tyrant and take away the rights of criminal defendants in a court of law; a judge who will rule against you over and over and over again without even so much as thinking about it; in my personal experience for those many years with cameras in most of my cases in Massachusetts, those few—they weren't many—those few judges who fit that description, really stayed honest. And those who really wanted to get out from under that; you know where they take you? Chambers. The judges who were good judges remained good judges whether the camera was there or not.

. . .

One of the things that the camera should do for the public is that the camera can be a good educator; not only for the people who are out there to see what's reflected by the camera, but also for those participants in the trial. If it does affect the lawyers in any way, it makes them better prepared. The camera is a brutal reflector . . .

When you have issues of police perjury, police misconduct, possible conspiracies, and the misuse of informants, the only people who are not surprised are people of color, or people who . . . have had brushes with the criminal [justice system], and criminal defense lawyers. We were the only three groups who were not shocked by the Furchman tapes. We said, "Well, that's business as usual." Everyone else in the world was shocked, including journalists by the way. And the only way to be able to expose that kind of conduct—so that the public really gets it—is with the camera. Because the newspapers—even with the best of intentions and with the

most erudite readers of the New York Times or Los Angeles Times—are not all of the public, and at least the word goes forth.

You know, the words of Justice Brandeis were that “sunshine is the best of disinfectants.” I think I will leave you with that.

III. ETHICS FOR PUNDITS AND PROGNOSTICATORS

PANELISTS: Leslie Hope Abramson,⁶ Lane Jay Liroff,⁷ Geraldo Rivera,⁸ Henry Weinstein.⁹

6. Ms. Abramson received a BA. from Queen's College, Flushing, N.Y., in 1964 and a J.D. from UCLA School of Law in 1969.

Abramson has been a sole practitioner in criminal defense since 1976; she was a Los Angeles County deputy public defender from 1970 to 1976. She is past president of California Attorneys for Justice and a member of the National Association of Criminal Defense Lawyers, Los Angeles County Bar Association, and Los Angeles Criminal Courts Bar Association.

In 1988 and 1993, Abramson was voted Trial Lawyer of the Year. She has participated in such high-profile cases as the People v. Eric Menendez. Her autobiography, *The Defense Is Ready*, will be published in February 1997 by Simon & Schuster.

7. Mr. Liroff received a B.A. in philosophy in 1972 from the University of California, Berkeley, and a J.D. in 1976 from Southwestern University. He has been a deputy district attorney with the Santa Clara County District Attorney's Office since 1979; a law instructor at Lincoln University School of Law, San Jose, since 1987; and since 1994, an instructor at the Administration of Justice Bureau, San Jose State University, where he teaches a course on the law of homicide to police officers. From 1976 to 1979, he was in private practice in Santa Cruz County.

Liroff has contributed articles on topics including criminal law, evidence, and prosecutorial and judicial misconduct, etc., to legal publications. He has prosecuted numerous high-visibility cases, including People v. Richard Ruiz and Richard Medina and People v. Eric Chatman and has been active in the Santa Clara County Bar Association and the Vanished Children's Alliance.

8. Mr. Rivera was educated at the University of Arizona, Brooklyn Law School, and the University of Pennsylvania School of Law. Since 1970, when he joined WABC-TV New York as a reporter for “Eyewitness News,” he has become one of America's best known television journalists and an award-winning investigative reporter. Since 1970, he has covered seven wars and obtained interviews with Fidel Castro, Charles Manson, and Lee Harvey Oswald's mother.

Rivera is owner of the Investigative News Group, and owner/managing editor of the newspaper *Two Rivers Times*. He was host of “Geraldo” (1987 to 1996); “Now It Can Be Told” (1991-92); and “The New Godfathers” (1993). He currently is host of “Rivera Live” (1994-present); and “The Geraldo Rivera Show” (premiered in September, 1996). He is author of five books, a news producer, a talk show host, and an advocate of community service. He is the recipient of many awards, including 10 Emmys, three honorary doctorates, and several journalism honors.

His philanthropic works consist of scholarship awards to deserving students, a nonprofit foundation promoting equal educational opportunity to junior

A. *Introduction*

Professor Chemerinsky began the discussion by outlining certain points from the article he coauthored with Dean Levenson. First, he offered that a voluntary code of ethics would help with issues that naturally arise for commentators. Chemerinsky also pointed out the conflict of interest problems faced by commentators when discussing cases on which they formerly worked or when they have relationships with an attorney or organization involved in a case on which they are commenting.

Dean Levenson followed with a discussion of commentator competency. Levenson suggested that while commentators need not be experts in all areas on which they comment, they should have a basic level of expertise in the area, some knowledge of the proceedings, and be willing to do the research necessary to be more informed.

B. *Panel Discussion Excerpts*

1. *Leslie Abramson*

...

I just want to touch upon some things from my experience as a commentator and my watching others that may have a slightly different perspective than Erwin [Chemerinsky] and Laurie's [Levenson].

I think that to use the term "commentator" in media does not define the very different ways that, in fact, we all were, and are, utilized by the various media outlets that we work for. And it makes a big difference as to what ethical lines you have to draw and, most importantly, whether or not you get to control the dissemination of your views. I have had two

high school students, and the annual Geraldo Rivera Golf and Tennis Classic to help build homes for mentally and developmentally challenged people.

9. Mr. Weinstein earned a B.A. in history in 1966 and a J.D. in 1969 from the University of California, Berkeley. He has been a staff writer for the *Los Angeles Times* since 1978; earlier, he was a staff writer for the *San Francisco Examiner*; a freelance correspondent for the *New York Times*, and a staff reporter for the *Wall Street Journal*. He has also written articles for *The Nation*, *Mother Jones*, *Saturday Review*, and *Coronet* magazines. While at the *L.A. Times*, he has covered local and national politics, labor, and the courts. He was one of four *L.A. Times* reporters who covered the Simpson trial virtually full time.

Weinstein is a member of the California Bar Association, Reporters Committee for Freedom of the Press, Media Alliance, and Investigative Reporters and Editors Inc.

completely different experiences in this regard. And frankly, because I was watching the trial and I was doing my work, I hardly ever got to see any other commentators. I saw very little of what Laurie did, very little of what Erwin did; I only saw really through that first trial, what ABC did—because that's who I was working for

I was paid for [commentating]. I have been told through media reports that I was probably paid more per appearance than anybody else who did it. I priced myself very high, and I did that in part because I needed the money, and secondly because I figured if they're willing to pay me that much then I can say "No, I won't do that," to them. If they respected me enough or felt they needed me or wanted me enough, then I could draw some lines, and that was very important for me. Far more important, in fact, in my second assignment.

I am working for King World, the producers of *American Journal* and *Inside Edition*, tabloid television shows, and King World does not know if they're journalists or not, so I'm there to tell them whether they are or not. And I can say "No" to them, and I do say "No" to them, and in fact I told them right up front "I will do this, I won't do that; don't ask."

. . .

The experience with ABC was very different. At first we thought, they thought, everybody thought, everybody was going to go gavel-to-gavel for a lot of the trial. That never happened, but there were very different roles and different problems for commentators who are gavel-to-gavel; who are there in and out every day watching the proceedings; who have to fill all those side-bars with chat; who have to fill all those breaks with chat; who have to talk and talk and talk and talk. The danger of them crossing the line—because you gotta keep saying something—is very great.

The second way that commentators were used is when, at the end of proceedings or during the course of proceedings, you go out to your camera crew and you're asked questions by either a producer or a reporter for the outlet that you're working for, and maybe you've had the opportunity, as Laurie mentioned, to say "Ask me this," or to actually have a meeting and work out what you're going to talk about, and maybe you don't. Maybe the question just comes zinging in from the stratosphere.

And now the real issue is, "Are you live or are you Memorex?" If you are live, what you say is what the world gets. There is no editing going on, and that's the best position to be in. If you're Memorex, you say "Blah, blah, blah, blah," and "blah" and "blah" wind up on the evening news, and you can be quoted out of context; you can be cut in half as Peter was, which is to his enduring regret. You have to learn the art of the 30 second sound-bite, making sure the balance of your position is in the first two words, because those they won't cut. Otherwise they get you in the middle of a sentence and it doesn't make sense. You have no control. That's another way you're used, which is dangerous, because you can be the most ethical person in the world, and they will use you in an unethical fashion—certain outlets—if they can.

Then there are the situations where . . . time is the crucial problem. Time is everything in Televisionland. They ask you a question that requires a twelve minute answer, and you've got twelve seconds to give it. So what you have to do is figure out what's the most important part of that question—or what's the most important part of my answer that I want to get across—and get that out up front, and then you're cut off and you're frustrated because there were six other equally vital things to say.

My experience in the [O.J. Simpson] criminal trial was [that] I worked for ABC. We went gavel-to-gavel for—I don't even remember now—all or part of the preliminary hearing. We had Peter Jennings as our anchor, one smart fellow, and that was useful. We had Cynthia McFadden as the legal affairs correspondent for ABC, who has maintained her Court TV style even while working for a network. That style I always called "on the one hand, on the other hand." "On the one hand, on the other hand" is balanced. "On the one hand, on the other hand" gives people a chance to make up their own minds, and Cynthia is extremely bright, as well as very talented as an on-TV personality, and she maintained that. I think she is among the networks the very best of the legal affairs reporters. And then they also had Peter [Arenella], with a law school professor and a previous defense attorney's perspective. They had Robert Philibosian, the former District Attorney for L.A., very right wing in his politics, but a wonderful person; and then they had mad dog me. And I suppose I was supposed to be the voice of the oppressed and hated,

and be a flack for the defense, but I had made up my mind that that's not who I was going to be for the purpose of this trial. This wasn't my case. I was not advocating. O.J. Simpson was not my client But the point was, I went in there [with this position]: "Okay. You're doing this in part for money, which is absolutely true, but you're also doing this in part because you've been so aggravated and you've had such a negative personal experience with how people commented on your cases, and you want to do it right, you want to be fair."

. . .

In any event, I was well aware of what I considered unethical commentary, because I had been the victim of it; of what I thought it was my role to do; and maybe I even bent over backwards in that criminal trial to sound more pro-prosecution than my defense lawyer's heart really felt. But I did not want to be dismissed, because defense lawyers [and their clients] were hated So I'm thinking, "No one's going to listen to me if I sit up there, like some people who do, and who still are doing it, and just be a flack for O.J. Simpson and his defense." I went out of the way not to do that. In fact, I think what I wound up doing was giving more very good advice to the prosecution about what would be a smart thing to do; none of which they ever took.

. . .

Now the law professors will all tell you—like Erwin and Laurie and Peter—the main purpose is to educate the public about the legal system. I had an educational purpose too, based on my real life experience as a defense lawyer: I was simply trying to make them understand the defense function, because I feel the public in general is so biased against criminal defendants that the prospect of fair trials is slipping away. Certainly the prospect for a fair trial for anyone who's already been vilified by the press and is having a retrial . . . is nil. Nil. You will never convince me that O.J. Simpson is now facing a truly unbiased jury, and I knew firsthand neither would the Menendez brothers. It isn't possible. So I was simply trying to at least make people understand we are not sleazes, not everybody accused is guilty, and not everybody accused who is guilty of something, is guilty of the thing that they're charged with. If I had a political role—that was my political role.

. . .

2. *Geraldo Rivera*

...

Why has this [O.J. Simpson criminal] case so fascinated all of us? I just briefly want to say what I think of what's going on here, and why we're even having a conference like this, and why a subject like ethics could fill [an auditorium of this size] at 9:00 o'clock on a rainy Saturday morning.

In the 19th Century in France a case began that ultimately resolved itself in the early days of the 20th Century—the Dreyfus case. [In that case] a man was falsely accused of treason by the establishment and imprisoned after some sensational trials with the press playing a very important role. Emile Zola ultimately said to the French establishment, the military specifically, "J'accuse (I accuse you) essentially of framing this guy." It changed French society forever. The old class structure, the way French people thought about their various institutions, how Frenchmen related—Catholic and Protestant and Jew—to one another, all were affected in a very profound way. [It] historically altered the [social and legal] landscape of France at the end of the last century.

The same thing is happening now. The Simpson saga, now almost as long as the Kennedy presidency—approaching 1000 days, believe it or not—is doing the same thing in our country. It has exposed, in all its glaring dimensions, the gap between white Americans and black Americans. It has exposed, in a way nothing else could, the difference between rich man's justice and poor man's justice. It has talked about domestic violence in a way that domestic violence would never have been talked about otherwise.

...

The [Simpson] case aside, we are at least using this, in the words of my colleague, Jim Moorhead, as a campfire around which we can gather to talk about issues that have been studiously avoided. There was not one word—I exaggerate, but not by much—in this presidential campaign about the single most egregious issue in our country today: racism, and how the races view each other, and the walls that now exist between white and black Americans. Not one word was spoken about it. Clinton, who was the beneficiary of a huge percentage of the African-American vote, studiously avoided the kind of traditional Democratic photo ops in church choirs and walking in the inner city.

...

The Simpson matter has forced us to pay attention to what ails us, and I think that's a good thing That is the silver lining of this chapter, of the Simpson matter.

...

Don't blame the cameras. Don't blame the defense lawyers. Don't blame the pundits. We have now, because of this catalyst, finally begun to look in the mirror and determine what kind of people we are.

...

3. *Lane Liroff*

...

There are issues relating to the quality of legal analysis that is provided on the air, and I think it's important that we address those issues. I am very pleased that our professors [Uelmen, Arenella, Chemerinsky, and Levenson] presented the work in these papers, because I think it begins the discussion that needs to be done. I think that during the past year or two all of us have become aware of these issues—issues of objectivity.

I think we all should realize that in the criminal law context there really are only two teams to play with: Either you are going to be in the prosecution camp or the defense camp, and as a result you have a tendency to see things according to what team you're playing for. There is, as a result of that, a tendency, to identify everything in your day to day life, and your professional life, according to that perspective. That carries forward if you're doing analysis, and that's clearly the danger.

...

There are other issues relating to the quality and the experience of the attorneys who provide legal analysis. There were on a number of occasions something of a game—I knew—among the attorneys; we would try and count obvious errors and mistakes that we observed; it was a form of sport for us.

I want to focus on one area though, in my presentation here this morning, that was raised in the professors' paper that I don't think they adequately addressed and discussed this morning . . . which relates to lawyers who specifically evaluate the quality of witnesses. By that [I refer to lawyers

who characterize witnesses'] demeanor and credibility, when [those commentators] have not necessarily witnessed the proceeding, or at best have only read a subsequent transcript. I think that is a serious, serious issue.

What am I talking about? Let's think about late last year, in November, when Mr. Simpson finally did testify [in the civil case]. Clearly, I'm a prosecutor, and you can imagine how I may have felt about that case. But clearly, I was not the only person in America who was truly looking forward for the opportunity to see Mr. Simpson—unencumbered by the Fifth Amendment—testify. And that night, after he had testified, or began testifying, and the next morning, on cable channels, on national channels, I saw a variety of pundits talking specifically about his testimony. And not just talking about content, but talking specifically about demeanor and credibility. This was an astonishing thing to me, because some of the pundits were in, I believe, Florida; some of them were in New York or Washington; some of them were in New Jersey That's an astonishing thing There's a problem when lawyers do this, and I think we should start the dialogue relating to this.

The first point is, it's just unfair to publicly say someone is not believable or, worse, brand them a liar, when you haven't seen them testify. I personally think there is something unfair or perhaps [even] dishonest about it I think we should also address [the issue] that lawyers, or reporters, don't necessarily have any better skills in telling when somebody is telling the truth than a lay juror. I have been trying cases for almost 20 years now, and when I go out, after a case is over, and I talk to the jurors, I find that the things that lawyers traditionally will focus on are not necessarily what the jurors focused on You have to realize then that when a lawyer or a reporter looks at something, they are looking at things [from perspectives not necessarily in-line with the jurors'].

Secondly, it's wrong to suggest that a person can ascertain the quality of a person's testimony based only upon a review of the transcript. There is so much more that is necessary If you ever have the opportunity, I recommend you look at the introduction to Louis Nizer's "Implosion Conspiracy." In that book, [the author] spends a substantial amount of time addressing the reality that from the cold written page

you cannot determine and evaluate truly a witness's demeanor and credibility.

Lastly, I think it's fraudulent to [characterize] or condemn a witness as noncredible or, worse, a liar, when simply you haven't had the opportunity to see them, to stare at them, and to evaluate them.

...

4. *Henry Weinstein*

...

I am well aware . . . of the fact that we in the media, although we can do a lot of very good things—exposing Watergate, exposing slum lords, exposing a lot of other things—can also do a lot of terrible things . . .

[O]ne other contextual thing: There are not simply pundits at trials. I think it's very important to remember that. Punditry dominates, in many ways, much of our life. When the President proposed his health care plan, there were all kinds of people called on, "what do you think about the pros and cons of this?" I mean, there are pundits for science, there are pundits for football, there are pundits for just about everything now.

Before I became a full time legal writer I was a labor writer for seven years, and I remember when I started out doing this, there was a guy, a really smart guy at MIT, who was an expert on a particular aspect of work place arrangements and technology, and I started using him in stories, and he was really good. And then something happened that was kind of striking. Other people read my stories, and they said, "Oh, well, if he knows about this, maybe he knows about something else." And this guy's a very smart guy, and I deeply respect him, but he ventured off into things that he didn't know a great deal about. That is one of the dangers in [punditry].

...

Now, let's talk about how you choose [pundits/analysts], and some of the things that can be difficult about this. I use analysts in at least three, maybe four ways. One of them is on what I'll call "issue stories." Soon after the Simpson case began, and they were going to start having hearings, I did a story When the preliminary hearing was about to start I [thought], "Why don't we just do a little educational primer

on what a preliminary hearing is about, what the purpose of it is?" What does somebody try to achieve in a preliminary hearing? And that began a long series of stories. We did stuff about Brady violations; you think of an issue, almost any issue that could have been unpeeled, and we tried to do a story about it. The one that I never actually got to do that I was planning to do—but the jury came back so fast—was a story at the very end about the evolution of the reasonable doubt doctrine. Maybe I'll have the occasion some other time.

[I tried] to call people that were practicing prosecutors, practicing defense lawyers, or professors, to talk to people that had been through one of these experiences, as a witness or something, to talk about it. In those cases, it seemed to me what you wanted to do was simply have somebody that knew what that subject was about. I can assure you that I did not call tax lawyers, probate lawyers, and family lawyers to ask them about preliminary hearings. It is stunning [however] because you would see some people being asked to talk about this stuff that didn't have the faintest idea about it, just because they were a good-looking face to put on television, and sometimes in a newspaper.

When you get to the case of an actual trial, it seems to me you've got a somewhat different situation with the issue stories. [In those instances] we used people to talk about daily developments, like "How did you react to the glove demonstration?" or "What did you think about this or that witness?" . . . We had side bars about specific developments . . . that went into long main stories we did; and we had a little innovation that became maybe the most widely read thing in newspapers during the trial What we did was talk to three people each day who had watched. We had two permanent people, Peter [Arenella] and Laurie [Levenson], and then we had a rotating person, because I felt it was very important that we have practicing lawyers do this. Since we were getting these services through the good grace of these people, gratis, I mean, the L.A. Times gave me no budget to do this, I was relying on people's good will. Well, there's not a practicing lawyer that's going to give up his entire practice to talk to me for free [thus the rotation] I tried to get as wide a range of people as I could get, both in terms of gender, ethnicity, pro-prosecution, pro-defense. Now, one way in which we were hampered in doing this, is that a number of

prosecutors, on orders of their bosses, were not allowed to comment on this case

I just want to say one other thing: . . . I want to endorse what was said in the Chemerinsky/Levenson article. If somebody's going to comment on something, they need to have watched it, and we were very, very rigorous with people about not asking them to comment about things that they hadn't watched.

IV. LEAKS, GAGS AND SHIELDS: TAKING RESPONSIBILITY.

PANELISTS: Judy Clarke,¹⁰ Rikki I. Klieman,¹¹ David Margolick,¹² Douglas E. Mirell,¹³ Robert L. Shapiro.¹⁴

10. Ms. Clarke graduated from Furman University in 1974 where she earned a B.A. in psychology. She received her J.D. in 1977 from the University of South Carolina Law Center.

Clarke is executive director of Federal Public Defenders of Eastern Washington and Idaho. She specializes in criminal defense at the trial and appellate levels and, for 19 years has represented clients in federal criminal cases ranging from white-collar crime to immigration offenses. She argued two cases before the U.S. Supreme Court and numerous cases before the Ninth Circuit Court of Appeals. Clarke was co-counsel for Susan Smith (South Carolina v. Susan Smith) and is co-counsel in Sacramento for Theodore Kaczynski, who is charged as the Unabomber.

Clarke writes regularly on federal sentencing guidelines, is a member of the editorial advisory board of the "Criminal Trial Practice Manual," and is active in a number of defense-related organizations. She is the president of the National Association of Criminal Defense Lawyers and a regular faculty member for the National Criminal Defense College in Atlanta, Ga.

11. Ms. Klieman earned a B.A. in theater at Northwestern University in 1970 and a J.D. from Boston University School of Law in 1975. After law school, she served as a law clerk for the Honorable Walter Jay Skinner of the U.S. District Court of Massachusetts and prosecutor with the District Attorney offices in Middlesex and Norfolk counties. Before starting her own practice, she was a partner at Friedman & Atherton, Boston. Currently, she is of counsel to the Boston firm of Klieman, Lyons, Schindler, Gross & Pabian and an anchor for the Courtroom Television Network in New York. She also has been featured on a number of other television programs including "Today," "Good Morning, America," and "The McLaughlin Group."

Klieman has been the subject of numerous magazine and newspaper articles, featured on television shows, and named one of the five most outstanding women trial lawyers by *Time* magazine in 1983. She is teaching as an adjunct faculty member at Columbia Law School. Additionally, she lectures throughout the country on the legal system and teaches trial advocacy at several academic institutions. Besides serving on the Advisory Committee of the U.S. Supreme Court, her many affiliations include membership in the American, Massachusetts, and Boston Bar associations and the Massachusetts Association of Women Lawyers.

12. Mr. Margolick received a B.A. from the University of Michigan and a J.D. from Stanford Law School. After working for The National Law Journal and The American Lawyer, Margolick joined The New York Times in 1981 as a

A. Introduction

In the final panel discussion, Professor Uelmen suggested that, rather than seeking to prevent the release of information about pending trials by broad gag rules, courts should focus on identifiable information that may prejudice a trial, and issue narrow protective orders. When lawyers or police violate protective orders, he argued, they should not be protected by Shield Laws. The public interest will best be served, he concluded, if trial participants take personal responsibility for the accuracy and appropriateness of the information they release, rather than anonymously leaking information.

law reporter for the metropolitan desk. In 1988 he became the National Legal Affairs Correspondent, during which he wrote the weekly "At the Bar" column and covered the trials of William Kennedy Smith, Lorena Bobbitt and O.J. Simpson. He is currently a contributing editor at *Vanity Fair* magazine. Margolick is the author of the book, *Undue Influence: The Epic Battle for the Johnson & Johnson Fortune*.

13. Mr. Mirell earned a B.A. in political science, cum laude, from Claremont Men's College in 1977 and a J.D. from U.C.-Davis Law School in 1980, where he won the school's 1977-78 outstanding advocate award and was volume editor in 1979-80 for the *Law Review*. A member of the California State Bar since 1980, he was admitted to the bar of the U.S. Supreme Court in 1986; the Ninth Circuit Court of Appeals in 1981; and to the Central, Eastern, Southern, and Northern U.S. District courts in 1981, 1986, 1987, and 1993, respectively. He has practiced extensively in state and federal courts and is presently a partner in the Los Angeles office of Loeb & Loeb, specializing in general business and corporate litigation. Mirell has written numerous op-ed articles, has published extensively on legal issues, has devoted substantial time to various nonprofit boards, and has undertaken a number of pro bono constitutional and civil rights litigation efforts. He received the Mexican American Legal Defense Fund's 1990 Legal Services Award and has been recognized by the ACLU for his work on behalf of Latino plaintiffs.

14. Mr. Shapiro earned a B.S. in finance from UCLA in 1965 and a J.D. from Loyola University School of Law in 1968 and was admitted to the California State Bar in 1969. He is also a member of the American Bar Association, Los Angeles County Bar Association, National Association of Criminal Defense Lawyers, and other groups. From 1988 to the present, he has operated his own firm in Los Angeles, Robert L. Shapiro, A Professional Corporation. Before opening his own firm, he was a Los Angeles deputy district attorney from 1969 to 1972; in sole practice in Los Angeles from 1972 until 1987; of counsel with two Los Angeles law firms; and a partner in Christensen, Miller, Fink, Jacobs, Glaser, Weil & Shapiro.

Shapiro has represented corporate clients, such as Mobil Oil and Northrup, in cases involving alleged criminal negligence; has spoken extensively before law groups; has won numerous awards; and is author of *The Search for Justice: A Defense Attorney's Brief on the O.J. Simpson Case* (Warner Books, 1996). His major cases include, in addition to the Simpson case, *People v. Christian Brando* and the successful representation of celebrities and public figures.

*B. Panel Discussion Excerpts**1. Rikki Klieman*

...

So what do you do, from the perspective of the criminal defense lawyer, [when] dealing with the issue of leaks and gags and shields? [What do you do] when the District Attorney's office issues a statement to the media. And note that many of [the DA offices] now have a full time employee who acts as a media consultant—I'll call him or her the PR person—[whose] job is to make sure that the press releases are given at the earliest possible moment to all of the local media about a particular case.

When I practiced in Massachusetts, it [the press release] would issue in the community of Cambridge, or in a tiny town called Newberryport, or on Martha's Vineyard. But within *that* particular community, that press release has already started the ball rolling at such a speed that you had better be careful, as the defense lawyer representing your client, that you are not rolled over, like by the ball I picture in the Indiana Jones movie.

So what are you going to do? Well, I suggest to you that you must combat that initial press release immediately, and you cannot simply say "no comment"; it doesn't work. So what you do must be within the bounds of ethics, because, [unlike] California, in Massachusetts there is a disciplinary rule that is modeled on the ABA standard and it is vigorously enforced. And you didn't want to become Dominick Gentile; you didn't want to spend the rest of your practice for many years going up to the United States Supreme Court.

You have to say something, and you had better say it with some degree of articulation and with all due speed, because you've got to get it out there before your client becomes Public Enemy Number One. We share one thing in common for sure: you must cultivate the media. You must befriend members of the media if you want to be a successful criminal practitioner in the world that we now know as the criminal justice system; [a world now] inundated by the media.

I think that cultivating the media is ethical. I think it is proper as long as you do not do something that is improper, such as give money or other favors. I think that it is proper to be able to talk to people from the media in your local commu-

nity on a regular basis. It is okay to have them at your Christmas parties. It's fine when you see them at the courthouse to have a cup of coffee with them, or a beer or a glass of wine. You would be a fool if you are a criminal defense lawyer in this day and age if you did not take advantage of that opportunity. And the reason is not because you are so self-aggrandizing that you want yourself in the press. This is done almost in a prophylactic fashion, I suggest, because when you represent a client, and he or she is accused of a terrible crime, you must all know that a criminal defendant truly is amongst the most pitiable amongst us all. But most people in society don't see that person as pitiable, they see that person as someone to be feared and someone to be hated. And it's not that the journalist is going to change the truth when your client is arrested for some terrible, alleged crime. It's that, at the very least, the journalist is going to do two things. He or she is going to give you a fair shake by giving you a phone call—which I suggest you take. The other, is that the journalist is not going to be so ready to believe the version that the government has given them on the silver platter.

I suggest if you represent a really big criminal, in the eyes of the law, and you can see right away that this is a big case, that if you are smart, what you should do ethically and properly from the criminal defense perspective is you ought to fashion your own press release.

...

2. *Robert Shapiro*

...

On the really serious issue of media leaks, if any of you students are interested in doing some serious research, I think it would be very eye-opening to track the recent [O.J. Simpson] trial [and compare] major events of importance to either side to news leaks; you will see an amazing coincidence. [For example] if there was [a courtroom proceeding] where the Coroner was severely impeached, the next day a news leak would take place, with information that was totally adverse to the defense.

[This] didn't happen once, it didn't happen twice, it happened continually . . . Judge Ito finally [required] that all

reports of scientific evidence had to be sent to him first before [they could be released to] anyone . . . including the lawyers.

I have great respect and admiration [for] my learned co-counsel and one of the most distinguished members of the O.J. Simpson defense team, Professor Uelmen. [However, I must strenuously disagree with his comments.] He lives sometimes in the [academic] ivory tower, and therefore does not deal with the day-to-day realities taking place in the world of instant communication. It is a world where the media, whether it be the most distinguished of newspapers and magazines or tabloids, is all powerful. Their power is overwhelming. And for those of you who may not be aware of it, the *National Enquirer*, [shockingly,] is the most widely read newspaper in the world. However, they all have one thing in common, and that is they are economically driven.

When you come to the realization that the media is an economic force in America, and that competition is an overwhelmingly important factor, you begin to realize how important it is for [one organization] to get a story quicker than a competitor. It is so fierce in television that producers believe you'll be watching all three networks at the same time, and whoever has the story first will be your network of choice. [In reality,] the only people that do that are the producers of all the network news shows. And without question, all news shows are produced. [It doesn't matter if it is] "World News Today," CNN, or a local news or "Hard Copy,"—there is not any spontaneous reporting of news. [They are carefully] produced, directed, and edited. [When] people come on [for interviews,] the commentators [and interviewees,] are briefed in advance on the positions they are going to take so that questions can be prepared and answers thought out before they are given.

. . .

3. *Douglas Mirell*

. . .

What I want to say first is that I think we all have some common ground. If you look at page 13 of Professor Uelmen's paper, you'll see some ethical rules of journalism that have been propounded by Sigma Delta Chi, the Society of Professional Journalists. And they lay out some ground rules which I think are essentially motherhood-type ground rules. Iden-

tify sources whenever feasible. Who's going to argue with that? The public is entitled to as much information as possible on sources' reliability. Why not? Avoid undercover or other surreptitious methods of gathering information, except when traditional open methods will not yield information vital to the public. After last week's \$5.5 million punitive damage verdict in the Food Lion case, is anyone going to disagree with that? Not likely; not likely.

But with all due respect, Professor Uelmen—and I do appreciate the invitation, and I join everyone here in thanking you for pulling this conference together—I think your oral presentation, your paper, and your paper's thesis are mostly beside the point. The reason I say that is because of the existence of gag orders. Gag orders are now being imposed or threatened with imposition with increasing frequency in courts across this country, partly in reaction to the Simpson case, partly for other reasons. [Also], the promulgation of attorney discipline rules which bar lawyers' extrajudicial comments on pain of possible disbarment. [These two limiting instruments] present, in my view, a clear and present danger to attorneys' First Amendment rights to speak and to provide public comment on matters of public concern; they seriously jeopardize the ability of lawyers to zealously represent their clients.

My bottom line is this: Unless and until courts cease imposing gag orders, and until all attorney discipline rules currently on the books are repealed, the suggestion that lawyers be singled out as the only sources who cannot communicate confidentially with a reporter respectfully ought to be a non-starter. Professor Uelmen's modest proposal . . . is a proposal that speaks not at all to the proper scope or limits of judicial gag orders. Rather, you'll find his proposal is simply to make the violation of a "valid protective order"—whatever that may be—a new basis for the bar's imposition of attorney discipline sanctions. I submit that's bizarre. Who is going to determine when a gag order is valid? When is that determination going to be made? Are attorneys going to make that determination for themselves? Are trial court judges going to make that determination? Must we wait for an appellate court to make a determination on a writ pending trial? Must validity or invalidity be conclusively established before the lawyer speaks, or can the lawyer instead undertake a good faith effort to speak

before validity is finally determined or before bar discipline is imposed?

I applaud Professor Uelmen's proposal for doing one thing: I applaud it for embodying a "clear and present danger" standard. That is a standard which a number of us, Professor Chemerinsky, myself and others who oppose the promulgation of any rule of professional conduct regarding pretrial publicity in the State of California, said that if you were going to [write] any rule, you ought to use a clear and present danger standard. That was the standard the State Bar in fact ultimately adopted in its proposed rules to the California Supreme Court. Unfortunately, however, the California Supreme Court rejected that standard, and adopted instead a "substantial likelihood" test. But I appreciate the fact that Professor Uelmen's proposed rule incorporates what is a more appropriate and clearly understandable standard; one that has some basis in case law, a "clear and present danger" test.

We who opposed the promulgation of California Rule of Professional Conduct 5-120, as it has now become to be known, were very concerned about the constitutionality of these rules. Professor Uelmen rightly points out that, for vagueness, these rules are as unconstitutional as was the original version of ABA Model Rule 3.6 and the Nevada rule of professional discipline which got the good Dominic Gentile into trouble. So, to the extent Professor Uelmen's proposal eliminates the "substantial likelihood" standard and imports a "clear and present danger" standard, it is a step forward.

Unfortunately, the balance of the rule really takes twelve steps backward by abandoning the concept—embodied in all versions of the ABA's Model Rule 3.6 and in all versions of California's new rule of professional conduct—that there must be some sort of imminent threat which will "materially prejudice an adjudicative proceeding." If you look at Professor Uelmen's proposed rule, it speaks not to "material prejudice," but to the "fairness" of an adjudicative proceeding. Well, in light of the comments we've heard from defense counsel this morning, what in our adversarial system of justice constitutes fairness? Fairness to whom? Must defense attorneys be fair to prosecutors? From whence does the duty arrive? How can you possibly reconcile that duty with the duty of defense counsel currently found in California Business &

Professions Code Section 6068(c), which admonishes California lawyers, "to counsel or maintain such actions or proceedings or defenses only as appear to him or her as legal or just, except in the defense of a person charged with a public offense." And, more broadly, how is the concept of fairness reconcilable with another statutory lawyer duty, the one that says "we are to abstain from all offensive personalty, and to advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause in which he or she is charged." Justice trumps fairness under the current rules every time: And I have no idea what, in the context of Professor Uelmen's proposal, the "fairness" of an adjudicative proceeding means.

Let me just conclude with this final thought. In thinking and writing about the lessons of the [O.J. Simpson] trial, I am concerned that Professor Uelmen may have forgotten some of the lessons of Watergate. What if John Dean, counsel to President Richard Nixon, had been Deep Throat? What if he is Deep Throat? We still don't know today who is. But as one who participated in an internal "investigation" which led to his famous conclusion about a cancer growing on the Presidency, John Dean would have been barred from speaking to Bob Woodward and Carl Bernstein off the record. I don't think that's a result which any of us ought to be applauding or supporting. Anonymous sources should be used infrequently. They should be viewed with suspicion, and that I think is where the matter ought to rest. If reporters choose to rely upon anonymous sources, if lawyers choose to avail themselves of the opportunity to speak to reporters off the record anonymously, I think we all ought to read what those stories say; we all ought to take what they say with a grain of salt, and the matter should be left there, at least and until we eliminate all rules of professional conduct which can sanction lawyers for speaking outside of court and all gag orders which can sanction them in similar ways.

...

4. *David Margolick*

...

I have often second-guessed how I might have covered the [O.J. Simpson criminal] trial differently than I did But one conclusion that I came to was that some of the most

important writing and reporting that was done was not done in the courtroom. Sometimes it was in the corridor outside the courtroom, which nobody could ever see because there were never any cameras there and reporters could buttonhole the lawyers as they walked by.

...

Most important reporting was done after hours. It was done at night. It was done over the weekends. It was done by talking to the lawyers away from court. And I mention this to address one particular point in Jerry's [Uelmen] presentation about anonymity. I want to defend Anonymous. I'm not defending Joe Klein here, I'm defending another Anonymous, the anonymous source. What I came to realize was that I didn't do enough of that kind of reporting. I wasn't calling these people after hours. I had the home numbers for all of the lawyers. They were very precious assets to us, contrary to what some people might think. I think virtually every lawyer in the case—I can't think of any exceptions really—was willing to talk about the case off the record, and willing to talk about what was going on in the case off the record. Sort of trying to set him straight. Trying to give him some kind of idea of the direction the case was going to take. Trying to make [the] reporting more enlightened and illuminating.

...

It's an ideal that no source would ever be anonymous, but that's just not the way the world works. People will always, for whatever reasons, and they have a variety of reasons, be willing to talk off the record anonymously. Lawyers invariably are willing to do that, and just in my experience, in the years that I've been covering the courts, it's changed dramatically in ten or fifteen years. Originally, there were still a few residual sticks in the mud who would say, "Well, it's a pending case, I can't talk about it." But they're really dinosaurs, and as long as you promise anonymity, people will talk about the case. They'll talk about it intelligently. They'll make your writing more intelligent. They'll make it more insightful. They'll give you an idea of where the thing is going. They're not just touting their own cases, but they're also stepping back. They're not necessarily acting as advocates, they're helping you just get a better fix on what's going on. They're not on their soap boxes. Some of my most valuable conversations were held off the record. I think that any kind

of a rule that would jeopardize that sort of arrangement would really be pernicious, and it would lead to more ignorant reporting.

The rest of Jerry's paper is not directly relevant to me—what lawyers can and can't do, what policemen can or can't say. This is really immaterial to me; it's not my job to worry about what their ethical proscriptions are. My job is to write as analytically and insightfully as I can and they'll have to suffer the consequences of any rules that they don't follow. That's not my concern. But I should say that I'm also bothered by the idea that Jerry seems to lay out a system where journalists could routinely be brought in if they cite anonymous quotes. Journalists could routinely be made to divulge their sources. And I won't get on the usual soap box and describe why I think that's a bad idea; it just seems self evident to me. It would have a chilling effect on people coming forward with legitimate information. I think it's really useless, and diversionary, and a waste of time—because journalists won't cough up the information.

...

Everybody's always referring to the media at this conference as if the media is a great enemy, but I think that the media is responding to a large appetite out there for information. And I think that if journalists were made sacrificial lambs and forced to divulge their sources, I think the public would suddenly come to appreciate our efforts more, and they simply wouldn't put up with that kind of requirement of us.

...

V. DINNER SPEECH BY CHIEF JUSTICE RONALD GEORGE¹⁵

Good evening. I want to thank Dean Uelmen for inviting me to participate in this event. This conference addresses a

15. Chief Justice George is a graduate of Princeton University's Woodrow Wilson School of Public and International Affairs (A.B. 1961) and a graduate of Stanford University Law School J.D. 1964. From 1965 to 1972, he was a deputy attorney general in the California Department of Justice, where he represented the state in six oral arguments before the U.S. Supreme Court and in numerous cases before the California Supreme Court, including the prosecution of Sirhan Sirhan for the murder of Robert Kennedy. In 1972, Governor Reagan appointed him to the Los Angeles Municipal Court; and Governor Jerry Brown appointed him in 1977 to the Los Angeles County Superior Court, where he served as supervising judge of the Criminal Division. In 1982 and 1983, he was president of the California Judges Association. Governor Wilson appointed him associate justice of the California Supreme Court in 1991; and in March 1996, he became

topic that I consider to be of great importance, and I am very pleased to have the opportunity to explore some of the issues surrounding the ever changing interaction of the courts and the media.

I have now been Chief Justice of California for over eight months. One of my earliest pledges was to increase outreach to all segments of the legal community and to the public as well. I promised to visit the courts in each of California's 58 counties, and, to date, I have journeyed to 22 counties. I hope to visit the remaining 36 by the end of this year. Many of these visits have included sessions open to the press. In addition, I have held meetings with each of the Associate Justices and staff at the Supreme Court, and with four of the six districts of the Courts of Appeal, as well as with segments of the bar including prosecutors and criminal defense lawyers, and plaintiffs and civil defense attorneys.

My efforts have extended beyond the courts to discussions with representatives of the counties, and ongoing conversations with legislative and executive branch leadership, including the Governor. Just last week, I delivered my second state of the judiciary address to a joint session of the legislature. In addition, and perhaps most pertinent to today's subject, I have held formal and informal conversations with members of the press.

Why have I undertaken these efforts? A number of factors have highlighted the need for increased communication to, from, and within the judicial branch. The judicial branch comprises one third of our governmental structure. It confronts daily substantive and structural challenges that go to the heart of our democratic system. Yet in many ways, it suffers from a widespread lack of public understanding about how it functions, and the importance of its role.

Tonight, I want to examine some aspects of the media's role in educating the public about the courts, and some related actions initiated by the courts. The media undeniably have a preeminent role in providing the information that col-

California's 27th chief justice. As Chief Justice, he chairs the Judicial Council of California and the Commission on Judicial Appointments and co-chairs the California-Federal Judicial Council.

George has authored numerous publications and lectured at educational programs. He is a member of the American Bar Association and the American Judicature Society.

ors the public's perceptions and comprehension of the judicial system. As authors Robinson and Sheehan observed in their book on coverage of the 1980 political campaigns, "in a world in which the press decides what not to report, the press becomes almost as important as the events themselves in the formulation of perceived reality"

That power to define reality was demonstrated earlier this week in a report on crime, on the television program "Nightline." It described results of a recent poll that asked people about the source of their impressions concerning our nation's crime problem. Twenty-two percent said their impressions were obtained from personal experience; seventy-six percent said through the media.

But what role can and should we rightfully expect the media to play in reporting on the courts? It has been argued that among the primary causes of dissatisfaction with the administration of justice is public ignorance of the real workings of courts due to ignorant and sensational reports in the press. Although Roscoe Pound made that assertion more than 90 years ago, it certainly remains a familiar complaint today. But do the media have any special obligations to fulfill when reporting on the courts?

Let me start with a comparison. Open almost any major newspaper on any given day, and you will find a section devoted exclusively to reporting on sports. There will be columns of win/loss information, team rankings, and player averages. Next to the statistics appear news stories on recent games, and columns reviewing strategies, rules, and achievements. Television and radio reporting follow a similar pattern.

In sports reporting, the context of each game is part of the ongoing stream of information. What is the relation of each game to the fate of the entire league, to the progression of the season, to the overall history of the game? How do the performances of the players measure up against others on their own team, on other teams, in years past? Those who follow sports read each story against a broad background of readily available relevant facts.

Compare, if you will, the press reports on the courts. Felix Frankfurter purportedly told James Reston that his paper, the *New York Times*, never would consider permitting a writer to cover the *New York Yankees* with as little back-

ground and knowledge about baseball as Supreme Court reporters generally have about the legal process. I must add a caveat here: the legal reporters at the *New York Times* generally are very well informed, and in California we are fortunate to have some fine legal and general circulation newspapers staffed by very knowledgeable reporters, some of them lawyers. But it is still too often the case that general media outlets are lucky to have one legal affairs reporter, who often has limited legal background and a wide range of other things to cover. On the other hand, it does seem that some sports reporters are becoming quite expert on contract, labor, and criminal law.

The reporting of legal news tends to lack the contextual detail of sports reporting. A particular case may be covered in excruciating detail. But its place in the larger context of the day-to-day operations of the legal system rarely is analyzed. Unique cases, involving unusual or sensational facts, highly publicized participants, or enormous sums of money, are paraded prominently across the front pages, and appear at the top of the television news.

But the judicial correction of the inflated verdict, the appellate decision reversing an anomalous judgment, and justice as administered in the everyday mix of cases important only to the parties rarely is given equivalent coverage, or even reported at all. Coverage of the work of appellate courts typically is a series of one-day phenomena. The media reports with an instant analysis of a decision, with limited, if any, commentary. And the story usually is buried in the middle of the paper or news report, and destined for little follow-up. There often is no real discussion of how or why the court arrived at its decision, only the bottom line of who won and who lost.

This, of course, probably should not be all that surprising. Lyle Denniston, Supreme Court reporter for the *Baltimore Sun*, in a panel discussion held at an American Judicature Society meeting, put it bluntly. Describing the role of the media, he asserted:

Are we not part of the furniture of the jurisdiction? We are not here to assist the system to function We have to get away from the notion that the press somehow has an obligation, a duty, to be an educative medium for a complicated institution like the judiciary. First of all,

we're not competent to do that. Second, we're not interested in doing that. We are covering the news as news.

He further explained that, after all, newspapers are business concerns. In short, we should realize that their aims are profit, not education, and set our expectations accordingly.

Fred Graham, chief anchor and managing editor of Courtroom Television Network, had a somewhat more measured response. He stated:

I would agree in some sense that there is not a responsibility to the courts or to a certain level of coverage. But all journalists, I believe, feel there is a responsibility to themselves as professionals and as journalists, and as [a previous speaker] says, as citizens, to do what they do in a responsible way.

In his view, then, there is a sense of professionalism that properly guides the journalistic enterprise.

In a way, his argument echoes ongoing debates in the legal profession: Should we concede that the practice of law is simply the running of a business? Or should we continue to stress that the practice of law is a profession, which places certain obligations and limitations on the conduct of attorneys for reasons that transcend the individual interests of a particular client?

One also can find debates about the balance and relationship between entertainment and news. And some decry what they see as an increasing seepage of opinion-laden articles spilling from the op-ed section onto the news pages.

I do not purport to have the knowledge or the expertise to engage fully in these debates. But I do believe it is safe for me to say that there is less than unanimity in the journalistic community itself about the basic role the media should play in reporting, and not just in reporting on the courts. The courts, in turn, hold a wide range of expectations about the media's role.

The issue is not simply *more* reporting. The recent advent of increased coverage of sensational cases and the introduction of Court TV have not resulted in creating the kind of informed population that the courts may necessarily have had in mind.

Upon consideration, I find myself drawn to a position closest to that enunciated by Fred Graham. I recognize that the media are profit-making enterprises. But I also expect

journalists to abide by a professional standard under which they discharge their role with an eye toward the public interest and not just pecuniary interest. In the same vein, in the continuing debate about the practice of law, I feel strongly that the need to make money cannot be allowed to trump the need to perform as a professional.

Like lawyers, journalists traditionally have occupied a special place in society. Both professions are seen as performing a role essential to our society's well-being, whether it is protecting legal rights or exercising first amendment rights. I therefore disagree with those who suggest that we should reconcile ourselves to the fact that reporting on the courts always will be a function of what will sell more newspapers or raise prime-time ratings. Instead, I believe that the press has both a right and a responsibility to consciously exercise judgment in selecting and presenting stories, and to strive for objectivity.

Describing the proper role of the media is far from a simple task. And critiquing how the media reports on the courts does not give rise to simple solutions. But even constructive criticism about media coverage must be tempered by self-scrutiny on the part of the courts themselves.

Courts are by their very nature conservative institutions. They rely on precedent, conduct deliberations in secrecy, and converse in arcane terms of art. I sometimes suspect that many judges would be just as happy not to have anything at all, beyond official reports, published about court operations and decisions.

Courts, unlike other organs of government, generally do not seek publicity. After a decision has been rendered, you will not find the judge who issued it out on the steps of the courthouse putting the best spin on the judgment or decision. It is an often repeated maxim that "opinions speak for themselves." Judges consciously and conscientiously refrain from further interpretation of their legal writings, until, perhaps, a later case.

As a result, when a verdict is entered, or a judgment made, or an appellate decision rendered, the individual who presided over its creation usually is nowhere to be seen or questioned. The press largely are left to their own devices, usually with deadlines looming. They must interpret a complex judgment representing the culmination of a lengthy trial

or revealed in a voluminous opinion that often seems written in a foreign language. And understanding the full context and consequences of a particular case is made even more difficult because so few cases are reported at all.

What, if anything, can be done to improve the situation? Well, we in the California judicial system are troubled by the public's lack of understanding about the courts and are taking steps to improve it. I believe it has become patently clear that if the judiciary wants a public that is better educated about the judicial branch, judges will have to take affirmative steps to help educate it. Rather than passively producing material that happens to be potentially newsworthy, the courts must take steps to see that their work product is more easily accessible and better understood.

There are, however, intrinsic limits that should not and cannot be breached. Some of the "secrecy" of the process is in fact vital to its integrity. Judges cannot be expected to go around explaining their opinions after the fact.

Thus, I do not anticipate seeing, nor wish to see, judges standing on the courthouse steps sharing with the press and the public the analytical path that led them to conduct a trial in a certain way or led them to write an appellate opinion reaching a particular conclusion. But that is not the end of the inquiry. Courts need to avail themselves of the opportunities that exist to educate the public more about what courts do and why the courts' work is important to the public.

Our appellate courts, for example, have a public information office that provides a host of information on the court system and on the issues facing the courts. Our courts now have a website, produced by that office. It contains information about the court system and the judicial council, which is the constitutionally created entity that I chair and that governs the judicial branch. The most popular item offered on the website is the guide to California courts, which describes the basic structure of our court system. In addition, anyone can quickly retrieve the full text of opinions as soon as they are issued by the appellate courts.

The major interaction between the community and the courts occurs in relation to jury service. Jury service in our state has for too long been not so much a form of service as an irritant. Jurors are inadequately compensated, and too often

their time is wasted, the facilities afforded them are deficient, and they are confused about their function.

Last year, a special jury task force reported to the judicial council on suggested improvements to the jury process. The council adopted a diverse package of recommendations that included increasing compensation, providing payment for necessary child care, transportation, and parking, improving how jurors' time is utilized, and providing tax incentives for employers to continue paying employees serving on juries. The governor's budget and a bill introduced by Senator Calderon both incorporate many of these suggested reforms.

The response rate to jury summonses has ranged from as low as five per cent in one large county to sixty per cent in some of the smaller counties. This is a glaring indication that large segments of the public do not feel invested in the court system and that juries are not representing as broad a cross-section of the population as would be desirable. The courts are attempting to respond to each of these concerns, and many have switched to a "one-day or one-case" form of jury duty.

Another area of jury service that frequently is mystifying rather than enlightening to the public, is jury instructions, many of which are unnecessarily encumbered with legalese or Victorian syntax. I recently appointed a task force to take a comprehensive look at jury instructions with an eye toward making them comprehensible to the laymen and women who serve on juries.

The Judicial Council also has scheduled a court community planning conference for later this year. This conference will bring together, from each county, teams of judges, administrators, bar members, and members of the public to learn about innovative programs and how to plan for the future of their local courts. The goal is to increase community involvement in court planning and operations.

Next week the Judicial Council will be receiving two reports from its fairness and access committees. One will be on race and ethnic bias in the courts, and the second will describe public hearings on access for the disabled. In previous years, the Council received and adopted a report on gender bias, and last year adopted an implementation plan addressing some of the problems revealed by that report.

The Council has, for the past several years, given priority to issues of access and fairness. After adopting as one of its primary goals the ensuring of fair and accessible courts for the people of California, the Council created a standing advisory committee to monitor these issues.

Making our court system more accessible and comprehensible is of particular concern in the family law area, which includes divorce and child support and child custody. It is both striking and disturbing that in some 60 percent of family law cases one party is not represented by counsel. In 30 percent neither party is represented. And in only 10 percent do both parties have legal representation.

The Council's advisory committee on family and juvenile law is focusing on means to make courts more user friendly. We are looking at projects such as revising forms into more easily understood language, setting up interactive kiosks for pro per litigants that will help guide them through the process, and establishing programs that will allow attorneys to provide limited representation for these litigants by assisting in filling out forms for a minimal fee.

"Day on the bench" programs bring legislators into the trial courts where they may observe judges close at hand to get a feel for the daily operations of our courts. "Meet a judge" programs, making judges available for questions in community forums, also help the dialogue. And bench-bar-media conferences, statewide and local, encourage informal interaction.

Judicial education that helps guide judges in dealing with the media is available through the Center for Judicial Education and Research. The Center's classes delineate the areas judges may address, and encourage courts to designate a spokesperson to deal with the press on a continuing basis. The media can benefit from more education about what judges permissibly may discuss, and judges need to be more willing to discuss those subjects.

There are many innovative programs underway at the initiative of the judicial branch. The courts have awakened to the realization that their once isolated ivory tower is now in the middle of a busy urban area. We need to talk to our neighbors more, because they are the public we serve and they need to know more about us and our role.

Even though many of us consider the media to be the public's eyes and ears on the court, it has become increasingly clear that we cannot rely on the media alone to educate the public about the courts. But that is not to say that we should abandon the effort to encourage the media to provide information that offers a fuller picture of the vital role of an independent court system in our democratic society.

I have served on the bench for almost 25 years, at every level of trial and appellate court in California. Every day I see cases that never make the front page, or any page for that matter, but that deeply affect the lives of individuals. The stories often are moving, the issues often of broad importance. I believe that despite the inevitable occasional aberration, day by day our courts, under difficult circumstances, do a remarkable job of administering justice in California.

As the media continues to debate its role in reporting not only on the courts but in general, I hope it will give high priority to defining and preserving journalism as a profession. Again and again it has been shown that, for better or worse, the public's views are shaped by the news they view on television and read in the newspapers. The challenge for the news media is to conduct itself in a manner worthy of that trust.

And we in the courts must also show ourselves worthy of the public's trust by providing the information that the public needs to know in order to fairly judge our own performance. These are difficult challenges to meet for both disciplines, journalism and the judiciary. But by joining together in sessions such as this one, we can mutually explore the best ways to accomplish our goals.

Thank you again for inviting me to speak to you tonight. I have enjoyed the opportunity to be here.

